In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-599

SECRETARY OF THE NAVY, et al.,

Petitioners,

v.

PRIVATE FRANK L. HUFF, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondents, by their counsel, move, pursuant to Rule 53, for leave to proceed in this Court in forma pauperis.

In support of this motion there is attached hereto the affidavit of the respondent Frank L. Huff.

Alan Dranitzke
Counsel for Respondents

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AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

County of LOS ANGELES,

State of CALIFORNIA, SS:

FRANK L. HUFF, being first duly sworn, deposes and says:

1. I am a respondent in the above-captioned proceeding.

2. The nature of the action is as follows. The Solicitor General, on behalf of the Secretary of the Navy and several military officers, seeks review of a judgment of the United States Court of Appeals for the District of Columbia Circuit which upheld the statutory right under 10 U.S. Code §1034 of military personnel at the United States Marine Corps Air Station, Iwakuni, Japan, to circulate on base petitions to members of Congress without prior command approval.

3. I am unable to pay the costs of the proceeding or to give security therefor.

4. I believe that I am entitled to redress.

Frank L. Huff
Frank L. Huff

Subscribed and sworn to before me this 8th day of December, 1978.

Irene Mc Culloch
Notary Public
My Commission Expires: Feb 22 1980

OFFICIAL SEAL
Irene Mc Culloch
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires FEB 22, 1980

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RESPONDENTS' BRIEF IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

Alan Dranitzke
David Rein
Rein, Drew, Garfinkle & Dranitzke
1712 N Street, N. W.
Washington, D. C. 20036

David Addlestone
National Veterans Law Center
Washington College of Law
American University
Washington, D. C. 20016

Attorneys for Respondents

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RESPONDENTS' BRIEF IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

The respondents individually and as a class, by their attorneys, respectfully request that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit be denied.

REASONS FOR DENYING THE WRIT

The United States Court of Appeals for the District of Columbia Circuit, in Huff v. Secretary of the Navy, 575 F.2d 907 (D.C. Cir. 1978) (App. A, 1a-32a), held that certain Navy and Marine Corps regulations, which prohibit any circulation of any petitions to members of Congress by military personnel on the Marine Corps Air Station, Iwakuni, Japan, without prior command approval, violate 10 U. S. Code §1034. The Solicitor General, in his Petition for a Writ of Certiorari (Pet. 9-20) and his Supplemental Memorandum (Supp. 1-2), essentially makes the following three arguments as to why a writ

of certiorari should issue in this case: (1) an important issue of law is presented as it relates to our nation's security; (2) the decision of the Court of Appeals conflicts with Greer v. Spock, 424 U.S. 828 (1976); (3) the Court of Appeals' opinion represents an erroneous interpretation of 10 U. S. Code §1034. As will be discussed below, none of these contentions are supportable and, accordingly, there is no reason to grant the petition of the Solicitor General.

1. The Solicitor General argues that the military services believe some form of prior restraint over on-base petitioning activities of service personnel is essential and, therefore, the regulations under review are necessary to the security of our nation; it is argued that the decision of the Court of Appeals, striking down that prior restraint system as applied to petitions to Congress, interferes with the role of the military. The government contends that this is a significant question of law and that the decision below has world-wide effect. (Pet. 9-10, 14-18; Supp. 2.)

The Solicitor General's argument is pure hyperbole. Never, at any stage in the proceedings, has the government requested a stay of the injunction originally issued by the District Court on May 27, 1976 (App. F, 55a-57a). That injunction, despite its supposed world-wide adverse effects, has been in existence for two and a half years now and the government has never requested a stay either from the District Court or from the Circuit Court or from this Court.[1/] The only procedural requests the government has filed in this Court and below have been motions, numerous ones, for extensions of time.

1/ The original injunction issued by the District Court was actually broader than the decision of the Court of Appeals, since it included within its scope the distribution of materials as well.

No presentation has been made at any stage by the government that respondents' activities or the court's injunction actually interfered with the proper functioning of the military. This clearly demonstrates that there is no merit to the government's contentions.[2/]

The decision below simply permits military personnel to originate, circulate, and sign petitions to members of Congress on a military base at Iwakuni, Japan, without first submitting them to their commanders for prior approval. Such a decision does not, as shown by the actions of the government, realistically relate to our national security.

2. Contrary to the contentions of the government (Pet. 11-18), the decision below does not present a direct and irreconcilable conflict with this Court's decision in Greer v. Spock. That case involved the authority of the military to prohibit and/or restrain civilians from bringing on to a basic training base partisan political campaign speeches and literature. Here, respondents are members of the military itself seeking to circulate petitions among other members of the military on their own base, which is not a basic training camp, pursuant to their rights under 10 U. S. Code §1034. As stated by the court below:

> "We find Greer neither controlling nor persuasive with respect to the issue of the validity of the regulations implementing a system of prior restraint on petitions at the Iwakuni Air Station. Most significantly, of course, the holding in Greer was constitutionally based. The Greer Court had no occasion to consider the validity of that prior restraint regulation under §1034 because petitions to Congress were not involved in Greer." Huff v. Secretary of the Navy, supra, 575 F.2d at 915 (App. A, 18a). 3/

2/ The conclusory allegations found in the affidavit of a Marine general (App. G, 58a-63a) did not impress the District Court or the Court of Appeals. The fact that at no stage has the government requested a stay of the injunction belies the allegations of the affidavit.

3/ The respondents do not in any way concede that the voided regulations are constitutionally permissible. See Huff v. Secretary of the Navy, supra, 575 F.2d at 911, 915 (App. A, 7a-10a, 20a).

Recently, two appellate decisions from the Ninth Circuit, Allen v. Monger, 583 F.2d 438 (9th Cir. 1978) (Supp. App., 1a-12a), and Glines v. Wade, No. 76-1412 (9th Cir. Oct. 5, 1978) (Supp. App., 13a-27a), likewise found no conflict between Greer v. Spock and their holdings that the military's prior restraint systems were invalid. In Allen v. Monger, supra, 583 F.2d at 442 (Supp. App., 12a), the Ninth Circuit stated:

> "Greer v. Spock, . . . , which the government emphasizes, does not apply to this case. Greer rejected the First Amendment claims of uninvited civilians on a military reservation. The present case deals with military personnel claiming rights under a statute enacted for their benefit."

In fact, contrary to the Solicitor General's contentions, there is no conflict between the decision below and this Court's opinion in Greer v. Spock.

3. The court below simply applied the statute, 10 U. S. Code §1034, in invalidating the regulations restricting service members' rights to communicate with members of Congress. The government contends (Pet. 19-20) that the court's interpretation of the statute's language and history is in error.

First, as found by the court below, Huff v. Secretary of the Navy, supra, 575 F.2d at 912-13 (App. A, 11a-13a), there is nothing in the actual language of the statute which restricts its protections to an individual military member's right to send a grievance to a member of Congress.[4/] This can be the only proper view of the statute, given the "long and cherished tradition in this country," as guaranteed by the First Amendment, to petition the government for redress of grievances. Second, the legislative history of 10 U. S. Code §1034 relied upon by the government is incomplete, and thus,

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4/ Although the government contends (Pet. 14, 19) that nothing in the regulations restrains individual communications with Congress, the government also recognizes (Pet. 19 n. 14) that an individual's communication can be a "petition." The regulations require prior approval for the origiination, signing, and distribution of any petition (Pet. 3). Accordingly, even under the government's argument, there is a direct conflict between the regulations and the statute.

distorted. The more extensive legislative history set forth in Allen v. Monger, 583 F.2d at 440-42 (Supp. App., 6a-10a), demonstrates that the original purposes of the statute were much broader than the government's contentions. Furthermore, the Department of Defense Directive No. 1325.6 supports the respondents' position that the statute encompasses the right to petition. See Huff v. Secretary of the Navy, supra, 575 F.2d at 912-13 (App. A, 12a).

In addition, the correctness of the Court of Appeals' interpretation of 10 U. S. Code §1034 is shown by the facts in this case. See Huff v. Secretary of the Navy, supra, 575 F.2d at 909 n. 2 (App. A, 3a n. 2). The military used prior restraint regulations to prohibit proper petitions. Statements by the commanding officers denying approval of requests to circulate petitions and other materials amply demonstrate that their decisions were the result of, at best, disagreement with the substance of the petitions or the result of whim and caprice. In fact, the actions of the military officials were so insupportable that the government found itself forced to concede error both in the District Court and in the Court of Appeals. A review of the facts leads one to believe that the entire purpose of the regulations is to inhibit the circulation of petitions by requiring prior approval.

The government contends (Pet. 14): "The regulations at issue in this case strictly limit the grounds on which commanders can disapprove circulation of petitions. It therefore can be expected that most petitions will be approved for circulation." But, as demonstrated by the facts in this case, the requests to circulate petitions were denied for reasons outside the language of the regulations. The one time the language of the regulations was employed, the commanding officer disapproved one respondent's request as "a clear hazard to discipline and morale;" yet, on that very same date, that same commanding officer approved distribution of that very same leaflet by another respondent. Thus, it is perfectly plain, as both Courts of Appeals have

held, that the rights of military members to petition Congress cannot be effectively exercised under regulations requiring prior command approval.

It is clear that the decision below was correct, both with regard to the language of the statute and its legislative history. However, if the military services do not care for the result of the Court of Appeals' decision, their proper avenue for relief is the Congress of the United States and not this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

Alan Dranitzke
David Rein
David Addlestone

Attorneys for Respondents

December 1978